(1930); *Parrot* v. *Gulick*, 145 Okla. 129, 292 Pac. 48 (1930); *Commercial Credit Co.* v. *McNelly*, 171 Atl. 446 (Del. 1934); *In re Lowry*, 40 F. (2d) 321 (Va. 1930). But it would seem that the legislature in abrogating the *Bill of Sales Act*, which had proved ineffective in preventing fraudulent transfers, intended this act to be applied strictly and unless a certificate of title is issued, intended no valid title to pass.

ZENDA L. LIEBERMAN

## WARRANTIES — WATER AS FOOD

Plaintiff sued a restaurant keeper as a result of illness suffered by him from eating a dinner purchased and served at defendant's restaurant. The illness was caused by bacteria present in the water furnished by defendant from its own well. Plaintiff alleged breach of implied warranty and negligence. *Held*, the trial court committed prejudicial error (1) in refusing to charge the jury on the question of implied warranty[1]; (2) in refusing to charge the jury that a violation of the pure food and drug laws[2] of Ohio is negligence *per se*[3]. *Yochem* v. *Gloria, Inc.*, 134 Ohio St. 427, 17 N.E. (2d) 731, 13 Ohio Op. 29 (1938).

The pure food and drug laws are statutes passed for the protection of the public and neither intent to violate them nor knowledge of their violation are elements of the crime.[4] If these sections are invoked in this case, it is necessary to determine that drinking water is "food"[5] and that

[1] Ohio G. C. sec. 8395 in part: "Subject to the provisions of this chapter and of any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract to sell or a sale, except as follows:

"1. When the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment, whether he be the grower or manufacturer or not, there is an implied warranty that the goods shall be reasonably fit for such purpose."

[2] Ohio G. C. sec. 5774 in part: "No person, within this state, shall manufacture for sale, offer for sale, sell or deliver, or have in his possession with intent to sell or deliver, a drug or article of food which is adulterated within the meaning of this chapter, . . . "

*Ibid.*, sec. 5775, in part: "The term 'food' as used in this chapter, includes all articles used by man for food, drink, flavoring extract, confectionery, or condiment, whether simple, mixed or compound."

*Ibid.*, sec. 5778, in part: "Food, drink, confectionery or condiments are adulterated within the meaning of this chapter (1) if any substance or substances have been mixed with it, so as to lower or depreciate or injuriously affect its quality, strength or purity; . . . (5) if it consists wholly, or in part, of a diseased, decomposed, putrid, infected, tainted or rotten animal or vegetable substance or article, whether manufactured or not in the case of milk, if it is the product of a diseased animal; . . . (7) if it contains any added substance or ingredient which is poisonous or injurious to health; . . . "

[3] *Portage Markets Co.* v. *George* 111 Ohio St. 775, 146 N.E. 283 (1924); *Taugher* v. *Bennington*, 127 Ohio St. 142, 187 N.E. 19 (1933).

[4] *Portage Markets Co.* v. *George*, and cases cited therein, note 3, *supra*.

[5] Ohio G. C. sec. 5775, note 2, *supra*.

as such it was "sold"[6] or "delivered"[7] to the plaintiff. A literal interpretation of the statute allowed the court to find drinking water included; whether or not the water was sold is a question which may be common both to the application of the pure food laws and to the existence of an implied warranty.

The authorities are not in accord on the question of whether or not a restaurant keeper, who serves unwholesome food, is under an absolute liability for damages resulting from the impurities, on the theory of an implied warranty of fitness. Those which hold that he is not so liable but is liable only for failure to use reasonable care, take the position that the transaction is one of service and is not a sale of the food;[8] that title to the food never passes. Those courts which impose an insurer's liability upon the restaurant keeper adopt the view that the transaction is a sale of the food.[9] This latter view was followed in the principal case, which presented the question to the Ohio Supreme Court for the first time.[10]

However, the real issue in the case is more narrow and has never before been decided. Both parties agree that a sale results and a warranty is implied when a restaurant keeper furnishes a dinner to the patron, but the defendant insists that drinking water furnished with the

[6] Ohio G. C. sec. 5774, note 2, *supra*. Ohio G. C. sec. 8381 (2) "A sale of goods is an agreement whereby the seller transfers the property in goods to the buyer for a consideration called the price."

[7] See Ohio G. C. sec. 5774, note 2, *supra*. The cognate section, 81 Ohio Laws 67, sec. 1, originally passed in 1884, did not contain the word "deliver." By amendment in 1908, 99 Ohio Laws 257, it was provided that no one should *deliver* an article of food which was adulterated, and Ohio G. C. sec. 5774 contains this same prohibition. It is only fair to assume that the legislature intended the word "deliver" to have force or it would not have been added to the statute. Thus, it would seem that a mere delivery of adulterated food is a violation of Ohio G. C. sec. 5774, a statute passed for the protection of the public, and is negligence *per se*. *Schell* v. *Du Bois, Admr.*, 94 Ohio St. 93, 113 N.E. 664 (1916).

[8] *Sheffer* v. *Willoughby*, 163 Ill. 518, 45 N.E. 253, 34 L.R.A. 464, 54 Am. St. Rep. 483 (1896); *Merrill* v. *Hodson*, 88 Conn. 314, 91 Atl. 533, L.R.A. 1915B 481 (1914); *Valeri* v. *Pullman Co.*, 218 Fed. 519 (1914); *Kenney* v. *Wong Len*, 81 N.H. 427, 128 Atl. 343 (1925); *Nisky* v. *Child's Co.*, 103 N.J.L. 464, 135 Atl. 805 (1927); BEALE, INNKEEPERS AND HOTELS, sec. 169 (1906).

For an interesting comment on the authenticity of the early English "precedent" relied upon by the above cases, see MELICK, THE SALE OF FOOD AND DRINK (1936) note pp. 201, 2, where the author points out that the early common law considered a taverner as both *giving* and *selling* his food and drink, and imposed upon him an absolute duty to furnish wholesome victuals. See also note 2, Ch. I, of MELICK, *supra*.

[9] *Fried* v. *Child's Dining Hall Co.*, 231 Mass. 65, 120 N.E. 407, 5 A.L.R. 1100 (1918); *Barrington* v. *Hotel Astor*, 184 App.Div. 171 N.Y.Supp.840 (1918); *Greenwood* v. *Thompson Co.*, 213 Ill. App. 371 (1919); *Smith* v. *Carlos*, 215 Mo. App. 488, 247 S.W. 468 (1922); *Temple* v. *Keeler*, 238 N.Y. 344, 144 N.E. 635 (1924); *Cushing* v. *Rodman*, 82 Fed. (2d) 864 (1936); *Heise* v. *Gillette*, 83 Ind. App. 551, 149 N.E. 182 (1925); *Stanfield* v. *Woolworth Co.*, 143 Kan. 117, 53 Pac. (2d) 878 (1936).

[10] Two earlier cases in the lower courts held that serving pie to a patron for consumption on the premises constitutes a sale of the pie by the restaurant keeper. *Clark Restaurant Co.* v. *Simmons*, 29 Ohio App. 220, 163 N.E. 210 (1927); *Woolworth Co.* v. *Wilbois*, 8 Ohio L. Abs. 16 (1929).

dinner is "a mere gratuity and not a part of the dinner and therefore not connected with the sale."

The argument of defendant seems to be that there was no warranty with the water because no separate price was charged for the water. It can readily be seen that if the presence of a warranty is to depend upon the existence of a price tag on the warranted article, its value to the consuming public will be greatly restricted. There are often many items of food, varying in number with the policy of the particular restaurant, for which no separate price is charged, which are not ordered by the patron and yet are served to him with his order. It would seem that title passes, at least to as much as he consumes.

An analogy may be drawn from those cases which have held that the serving of game, liquor and adulterated food at restaurants and boarding houses violates statutes prohibiting the sale of such commodities.[11] In the *Worcester* case[12] the court declared that "the purchase of a meal includes all the articles that go to make up the meal. It is wholly immaterial that no specific price is attached to those articles separately."

However, it doesn't seem necessary to establish a sale of the water in order to impose a warrantor's liability upon the defendant. A sale is not the only transaction in which a warranty may be implied.[13] The relationship between the parties was at least a contractual relationship[14] and "every argument for implying a warranty in the sale of food is applicable with even greater force to the serving of food to a guest or customer in an inn or restaurant."[15]

The reason for implying a warranty is public interest in the preservation of health[16] and it seems desirable for courts to extend the doctrine[17] to keep pace with modern conditions. With so many of our population depending upon restaurants, hotels and other eating places for their meals and with the extreme difficulty of proving negligence in such cases, the imposition of an absolute liability for the wholesomeness of all

[11] *Commonwealth* v. *Worcester*, 126 Mass. 256 (1879), (intoxicants with meals); *State v. Lotti*, 72 Vt. 115, 47 Atl. 392 (1900), (liquor with meals); *Commonwealth* v. *Warren*, 160 Mass. 533, 36 N.E. 308 (1894), (impure milk served with meals); *People* v. *Clair*, 221 N.Y. 108, 116 N.E. 868, L.R.A. 1917F 766 (1917), (partridge served out of season); *Commonwealth* v. *Miller*, 131 Pa. 118, 8 Atl. 938, 6 L.R.A. 633 (1896), (oleomargarine served with meals).

[12] Note 11, *supra*.

[13] *Friend* v. *Child's Dining Hall Co.*, note 9, *supra*; *Barringer* v. *Ocean S. S. Co.*, 240 Mass. 405, 134 N.E. 265 (1921); WILLISTON, SALES (2 ed.), sec. 242b.

[14] *Cushing* v. *Rodman*, note 9, *supra*.

[15] WILLISTON, note 13, *supra*.

[16] *Weideman* v. *Keller*, 171 Ill. 93, 49 N.E. 210 (1897).

[17] *Bekkevold* v. *Potts*, 173 Minn. 87, 216 N.W. 790, 59 A.L.R. 1164 (1927).

food items served in connection with the meal is desirable.[18] This liability may be justified for the same reason that one who chooses to engage in an ultra-hazardous activity is held absolutely liable.[19]

JOHN M. BOWSHER

[18] The rule laid down in the Year Books recognized an insurer's liability upon taverners, victuallers and the like. "For if I come into a tavern to eat and the taverner *gives* and *sells* me beer or goods which is corrupt, by which I am put to great suffering, I shall clearly have an action against the taverner on the case even though he makes no warranty to me." Year Book 9 Hen. VI 53. (Writer's Italics) This liability arose from the calling or trade of the seller and as the result of old criminal statutes bottomed on public policy. *Burnby* v. *Bollett*, 16 M. & W. 644, 153 Eng. Rep. 1348; AMES, LECTURES ON LEGAL HISTORY, p. 137; 3 HOLDSWORTH, HISTORY OF ENGLISH LAW, pp. 385, 386, 447, 448; MELICK, note 8, *supra*. The same reasons for the enforcement of the rule exist with even greater force today.

[19] *Parks* v. *Yost Pic Co.*, 93 Kan. 334, 144 Pac. 202 (1914). See 25 Yale L.J. 679 (1916).

# TRADE REGULATIONS

## EMPLOYER PROTECTION FROM EMPLOYEE COMPETITION AFTER A TERM OF EMPLOYMENT

In the comparatively recent case of *Curry* v. *Marquart*,[1] the Supreme Court of Ohio had occasion, for the first time, to consider the extent to which Ohio employers can protect themselves from the competition of former employees. Plaintiff's business was that of dealer in milk at wholesale, for whom the defendants operated a route. No written lists of customers passed from employer to employees, nor did the employer exact of these routemen covenants not to compete after the termination of the employment. After a period of a few months, the defendants broke off the relationship to establish a similar business, competitive to the extent that their new route covered a portion of that previously operated by them for the plaintiff. Faced with this threat of competition at the hands of those familiar with his customers, plaintiff sought the aid of a court of equity. Ohio doctrine seemed to favor his suit, for in *French Bros. Bauer Co.* v. *Townshend Bros. Milk Co.*[2] the Court of Appeals for the First District had, despite the absence of a written list of customers, enjoined similar employee competition on the basis of a tort of unfair competition. But the Court of Appeals ruled contrariwise in the instant litigation. Taking the case on a certification of conflict, the Supreme Court adopted the view espoused by this latter appellate court.

[1] 133 Ohio St. 77, 11 N.E. (2d) 868 (1938).
[2] 21 Ohio App. 177, 152 N.E. 675 (1925).